APPEAL NO. 031189
FILED JUNE 30, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 15, 2003. The disputed issues from the two benefit review conferences were whether the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the first through the sixth quarters and whether the appellant/cross-respondent (carrier) is relieved of liability for SIBs because of the claimant's failure to timely file an Application for SIBs (TWCC-52) for the second through the sixth quarters. At the carrier's request, the hearing officer added the issues of maximum medical improvement (MMI) and impairment rating (IR). The claimant appeals the hearing officer's determinations that she is not entitled to SIBs for the first through the sixth quarters and that the carrier is relieved of liability for SIBs because of the claimant's failure to timely file a TWCC-52 as follows: (1) second quarter – entire quarter; (2) third quarter – June 29, 2002, through August 27, 2002; (3) fourth quarter – entire quarter; and (4) fifth quarter – December 28, 2002, through February 5, 2003. The carrier appeals the hearing officer's findings that the claimant reached MMI on January 5, 2001, with a 17% IR, as reported by the designated doctor in an amended report, and the finding on the direct result criteria for SIBs entitlement. The carrier responded to the claimant's appeal. There is no response to the carrier's appeal.

DECISION

Affirmed.

MMI AND IR

It is undisputed that the claimant sustained a compensable injury on _____, and that the carrier accepted a lumbar and thoracic injury. Following a CCH held on May 17, 2001, on the disputed issue of whether the claimant's compensable injury extends to and includes the cervical spine and reflex sympathetic dystrophy (RSD), a hearing officer issued a decision that the claimant's compensable injury does not extend to or include an injury to the cervical spine, but does extend to and include RSD. The carrier appealed the decision that the compensable injury extends to and includes RSD. There was no appeal of the decision that the compensable injury does not extend to or include the cervical spine. In Texas Workers' Compensation Commission Appeal No. 011334, decided July 30, 2001, the Appeals Panel affirmed the decision that the claimant's compensable injury extends to and includes RSD.

The designated doctor chosen by the Texas Workers' Compensation Commission (Commission) had initially reported on March 1, 2000, that the claimant had reached MMI on March 1, 2000, with a 6% IR. After reevaluating the claimant at the request of the Commission, the designated doctor certified in September 2001

(before the first quarter of SIBs began), that the claimant reached MMI on January 5, 2001, with a 17% IR, which included impairment for the lumbar and thoracic spine and for RSD. The treating doctor agreed with the designated doctor's January 5, 2001, MMI date and 17% IR. The designated doctor evaluated the claimant a third time at the Commission's request and again reported that the claimant reached MMI on January 5, 2001, with a 17% IR, which included impairment for the lumbar and thoracic spine and for RSD. The designated doctor also reported that a separate IR for just the thoracic and lumbar spine would be 12%. The carrier appealed our decision in Appeal No. 011334, *supra*, that the injury extends to and includes RSD to the district court, and apparently that appeal is still pending. The carrier contends that the great weight of the evidence supports a finding that the claimant reached MMI on March 1, 2000, with a 12% IR, and points out that the issue of whether the compensable injury extends to RSD is currently in litigation.

Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal. Thus, our decision in Appeal No. 011334 that the compensable injury extends to and includes RSD is binding during the pendency of the appeal of that decision to the court. Sections 408.122(c) and 408.125(e) provide that for a claim for workers' compensation benefits based on a compensable injury that occurs before June 17, 2001, the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI and the IR on that report unless the great weight of the other medical evidence is to the contrary. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight.

While there appears to be some difficulty in separating cervical conditions from the compensable RSD injury, the designated doctor indicates that he is rating RSD, which has been found to be a part of the compensable injury. We conclude that the hearing officer's findings that the claimant reached MMI on January 5, 2001, and that the claimant has a 17% IR are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

SIBs

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Rule 130.102. Since we are affirming the hearing officer's decision that the claimant has a 17% IR, the claimant meets the requirement of Section 408.142(a)(1) that the employee must have an IR of 15% or more from the compensable injury. Since it is undisputed that the claimant did not commute any portion of her impairment income benefits, the claimant has met the requirement of Section 408.142(a)(3). In dispute are the requirements of Section 408.142(a)(2) that the employee has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment, and Section 408.142(a)(4) that

the employee has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The carrier contends that the hearing officer erred in finding that the claimant was unemployed as a direct result of the impairment from her compensable injury during the qualifying periods for the first through the sixth quarters (September 16, 2001, through March 15, 2003). Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. It is undisputed that the claimant did not work during the relevant qualifying periods. Although there is conflicting evidence in this case, we conclude that the hearing officer's finding on the direct result criteria for SIBs entitlement is supported by the claimant's testimony and by the reports of the treating doctor, and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The claimant appeals the hearing officer's findings that she failed to provide a report from a doctor which specifically explains how her injury caused a total inability to work during the relevant qualifying periods; that other medical records show an ability to work; and that her documentation of attempts to obtain employment do not show that she made a good faith effort to obtain employment during the relevant qualifying periods. The claimant also appeals the hearing officer's determination that she is not entitled to SIBS for the first through the sixth quarters. The claimant contends that she proved that she had no ability to work during the relevant qualifying periods and that she documented a good-faith job search.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides that except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. Subsection (e) then lists information to be considered in determining whether the injured employee has made a good faith effort to obtain employment under subsection (d)(5). The Appeals Panel has held that medical evidence from outside the qualifying period may be considered insofar as the hearing officer finds it probative of conditions in the qualifying period. Texas Workers' Compensation Commission Appeal No. 001055, decided June 28, 2000.

Whether the claimant had an ability to work and whether she attempted in good faith to obtain employment commensurate with her ability to work during the relevant qualifying periods presented fact questions for the hearing officer to determine from the evidence presented. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that the complained-of findings

regarding the good faith criterion for SIBs entitlement are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The claimant appeals the hearing officer's determination that the carrier is relieved of liability for SIBs for the entire periods of the second and fourth quarters, for the third quarter from June 29, 2002, through August 27, 2002; and for the fifth quarter from December 28, 2002, through February 5, 2003. The findings of fact as to when the claimant filed her TWCC-52's with the carrier for the second through the fifth quarters are supported by the evidence and are not appealed. Those findings support the hearing officer's determination regarding the periods the carrier is relieved of liability for SIBs because of the claimant's failure to timely file a TWCC-52. *See* Rule 130.105(a). Since the claimant does not assert in her request for appeal any exception for the late filings of her TWCC-52's, we do not address that matter.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge